

# Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow

Stephen D. Sugarman

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Résumé de l'article

Même si le régime québécois d'assurance automobile constitue un modèle à suivre depuis 20 ans, aucun État américain n'a encore adopté un système d'indemnisation qui s'en approche. Le présent texte expose les raisons qui expliquent cet échec, tant en Californie qu'ailleurs aux États-Unis. Il fait ressortir les facteurs propres à ce dernier pays, qui permettent de distinguer la situation américaine de celle des provinces canadiennes, en particulier le Québec ; 1) Facteurs politiques — le pouvoir des avocats qui représentent les victimes, la situation dans laquelle se retrouvent les assureurs et le mode d'organisation des gouvernements ; 2) Les perceptions du public — méfiance à l'égard du gouvernement, des compagnies d'assurance et de la promesse d'une réduction des primes d'assurance automobile ; 3) Les traditions — l'individualisme américain et le faible degré de pénétration d'une idée de responsabilité collective ; 4) Compromis—abandonner le système américain de responsabilité civile implique la renonciation à plus de choses qu'ailleurs dans le monde ; 5) Considérations d'ordre général — craintes au niveau de la sécurité routière, des coûts et de l'« effet d'entraînement ». Enfin, l'auteur examine la possibilité qu'un ou plusieurs États américains puissent, à l'avenir, élaborer un système inspiré du modèle québécois.

# Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow

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Stephen D. SUGARMAN\*

*Although Quebec's no-fault auto insurance scheme has served for 20 years as an exemplary model to follow, so far not one of the United States has adopted anything even close to it. This article examines the reasons for that failure, both in California and throughout the country. Emphasis is given to several factors that stand in the way of U.S. reform and that may distinguish states in the U.S. from Canadian provinces generally and Quebec in particular: 1. State politics—the power of the lawyers who represent victims, the position of the insurers, and the structure of state government. 2. Public perceptions—negative attitudes towards government, the insurance industry, and the prospects of saving money on auto insurance premiums. 3. Traditions—the ideological strength of individualism and ideological weakness of collective responsibility. 4. Trade-offs—doing away with the tort system means giving up more in the U.S. than elsewhere. 5. Policy concerns—fears about safety, costs, and the « slippery slope ». Finally, the possibility that one or more U.S. states might in the future evolve towards the Quebec solution is explored.*

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\* Agnes Roddy Robb Professor of Law, University of California, Berkeley (Boalt Hall). Erica Craven provided very helpful research assistance.

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Quebec adopted a comprehensive auto no-fault plan more than twenty years ago<sup>1</sup>. As will be detailed below, it has apparently served Quebec very well. This approach has been pointed to with envy by no-fault devotees in other jurisdictions on both sides of the Canadian-U.S. border<sup>2</sup>. Yet, during this period, not one of the United States has embraced the Quebec example. In this article, I will discuss some reasons for this failure to act. At the end, I will explore ways in which some U.S. jurisdictions might begin to move in Quebec's direction. Although I will give special attention to the situation in California where I am based, my analysis is meant to apply generally across the U.S.

## 1. A Brief History of Auto No-Fault in North America

### 1.1 Beginnings

In North America, auto no-fault insurance began in Canada with the adoption of a scheme by Saskatchewan in 1946<sup>3</sup>. This was one of the models pointed to by Professors Robert Keeton and Jeffrey O'Connell when they published their famous blueprint for U.S.-style, auto no-fault in 1965<sup>4</sup>. In the U.S., a somewhat more modest version of the Keeton-O'Connell plan was adopted in 1970 by Massachusetts (where Keeton then taught and where auto insurance rates were annoyingly high)<sup>5</sup>. In the next few years, many other states and provinces followed suit<sup>6</sup>.

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1. *Automobile Insurance Act*, R.S.Q. 1977, c. A-25.

2. See e.g., J. O'CONNELL and C. TENSER, «North America's Most Ambitious No-Fault Law: Quebec's Auto Insurance Act», (1987) 24 *San Diego L. Rev.* 917; J. DAW, «Does Quebec Have the Answer?», *The [Toronto] Star* (16 May 1995) D1. See also the text of N. Weatherston published in this issue.

3. M.A. FRANKLIN, *Tort Law and Alternatives*, 2<sup>nd</sup> ed., Mineola, The Foundation Press, 1979, pp. 797-798; R. KEETON and J. O'CONNELL, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Auto Insurance*, Toronto, Little, Brown and Co., 1965.

4. R. KEETON and J. O'CONNELL, *op. cit.*, note 3.

5. M.A. FRANKLIN and R.L. RABIN, *Tort Law and Alternatives*, 6<sup>th</sup> ed., Westbury, The Foundation Press, 1996.

6. See U.S. DEPARTMENT OF TRANSPORTATION, *State No-Fault Automobile Insurance Experience 1971-1977*, Washington, Department of Transportation, June 1977, pp. 6-12; U.S. DEPARTMENT OF TRANSPORTATION, *Compensating Auto Accident Victims: A Follow Up Report on No-Fault Insurance Experiences*, Washington, Govt. Print. Off., May 1985, pp. 23-24.

## 1.2 Partial Plans in the U.S.

Yet, in the U.S. neither the Keeton-O'Connell proposal nor the enacted plans were comprehensive. Basically, the approach that won political acceptance in the 1970s was rooted in the goal of trying to rid the legal system of the huge mass of auto accident cases involving small injuries. These little cases were swamping the system. They took what seemed like ages to resolve. Some victims were obtaining substantial awards for pain and suffering for minor injuries, injuries that were long healed, and in some senses forgotten, well before the matter was put to rest legally. Other victims were getting nothing. Enormous legal fees and other expenses were incurred on both sides. Therefore, the thinking that won the day in nearly two dozen legislatures was that everyone would be better off if these little cases could be taken care of quickly, with all auto victims being assured that their medical expenses in minor injury cases were paid for and that at least a moderate amount of their wage loss was replaced. Put differently, why not dispense with often fruitless and costly inquiries into «fault» when the money spent on transactions costs could be put to use instead either to compensate victims who failed to recover under tort law or else to reduce auto insurance premiums<sup>7</sup>?

In some states, no-fault plans have successfully removed at least a substantial share of the smaller claims from the tort system. This goal was generally best achieved in jurisdictions that imposed a formal legal hurdle to the recovery of damages in tort for pain and suffering. In those states, minor injury victims effectively had no-fault benefits as their only remedy. These are generally termed the «modified» jurisdictions — because the right to tort recovery is modified<sup>8</sup>.

Other states, however, imposed no restriction on tort recovery for pain and suffering and their no-fault schemes are generally termed the «add on» plans<sup>9</sup>. There, the only limit in tort is that claimants can't recover damages for items already compensated by no-fault benefits. The hope for fewer tort claims in these states depends on the willingness of the victim voluntarily to

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7. M.A. FRANKLIN and R.L. RABIN, *op. cit.*, note 5, pp. 756-757 (reprinting, *Automobile Insurance... For Whose Benefit?*, A Report to Governor Nelson A. Rockefeller by the INSURANCE DEPARTMENT OF THE STATE OF NEW YORK, Albany, Insurance Department, 1970, pp. 17-44).

8. See, e.g., J. O'CONNELL and J. BARKER, «Compensation for Injury & Illness : An Update of the Conrad-Morgan Study», (1986) 47 *Ohio St. L. J.* 913, 930; see also M.A. FRANKLIN and R.L. RABIN, *op. cit.*, note 5, pp. 756-757 (referring to «mixed» plans).

9. R.H. JOOST, *Automobile Insurance and No-Fault Law*, 2<sup>nd</sup> ed., Deerfield, Clark, Boardman & Callaghan, 1992, section 1:1, 3; J. O'CONNELL and J. BARKER, *loc. cit.*, note 8, 930.

settle for prompt coverage of out of pocket losses and to forego the litigation route. While this seemed to have occurred in Saskatchewan under its original «add on» scheme<sup>10</sup>, in the U.S. no-fault benefits in «add-on» states all too often have served instead to encourage claimants to file tort claims and then to refuse to settle early because the no-fault benefits took care of their basic needs<sup>11</sup>. It should be no surprise that the U.S. «add-on» schemes have tended to increase auto insurance premiums overall<sup>12</sup>.

Fewer than a handful of the states removed even a modest share of the more serious injuries out of the tort system. To do so basically requires a combination of a) generous no-fault benefits for economic loss and b) a high «serious injury» threshold on suits for pain and suffering damages. Indeed, in the U.S. it is probably fair to say that really only Michigan and New York (two states bordering Canada) have adopted anything like a widespread auto no-fault plan. Even in those two jurisdictions, however, the most serious injuries have continued to be handled by tort law and not by no-fault. In Michigan, for example, about half of a motorist's insurance premium for bodily injury continues to fall on the liability insurance side (and about half on the no-fault side)<sup>13</sup>.

As auto no-fault became a hot issue in the U.S. in the 1960s and 1970s, some insurers proposed a «comprehensive» solution<sup>14</sup>. There would be no more tort remedy at all against other motorists (apart perhaps from intentional injury and drunk driving cases). But all (or virtually all) auto accident victims would be reimbursed for their full economic losses, usually from their own insurer, regardless of who might have been at fault in causing the accident. The argument on behalf of the comprehensive solution was that the most important benefits of the no-fault approach were just as applicable to serious auto injuries as they were to minor ones. In short, under this sweeping approach, auto insurance for bodily injury would become like insurance for the loss of one's vehicle owing to fire or theft.

Yet, rather than expanding on the initial, more-modest auto no-fault legislation, states went off in the other direction. Not only did the U.S.

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10. M.A. FRANKLIN, *op. cit.*, note 3, p. 798.

11. J. O'CONNELL and R.H. JOOST, «A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault», (1990) 51 *Ohio St. L. J.* 947, 947-948.

12. See, e.g., U.S. DEPARTMENT OF TRANSPORTATION, *op. cit.*, note 6 (May 1985); J. O'CONNELL and R.H. JOOST, «Giving Motorists a Choice Between Fault and No-Fault Insurance», (1986) 72 *Va. L. Rev.* 61.

13. U.S. DEPARTMENT OF TRANSPORTATION, *op. cit.*, note 6, p. 34 (May 1985).

14. M.A. FRANKLIN, *op. cit.*, note 3, pp. 801-803 (citing plan by American Insurance Association recommending comprehensive no-fault system and abolition of all tort law for automobile accidents).

no-fault movement come to a halt, but a few states even repealed their no-fault plans<sup>15</sup>. Moreover, in Michigan the most recent political response designed to reduce premiums (so far unsuccessful) has been to try to reduce no-fault coverage rather than to widen tort law's repeal<sup>16</sup>. And in New York, there seems to be no visible support to expand its plan to be as generous as Michigan's.

### 1.3 Bolder Plans in Canada

In Canada the story has been very different. Following the early Saskatchewan initiative, many provinces adopted no-fault plans and later expanded them<sup>17</sup>. Quebec, as noted at the outset, made the most dramatic reform by adopting a comprehensive scheme in 1977. In more recent years, Manitoba enacted a comprehensive scheme<sup>18</sup> and Saskatchewan expanded its plan to make it fully comprehensive<sup>19</sup>.

## 2. Why Has No State Followed the Quebec Example ?

By now, the Quebec model is hardly new. To the contrary, it has for two decades been there to be seen, studied and followed (or to be modified and then followed). Yet, not one of the American states has chosen to do so. Is this because the Quebec solution is a bad idea, or at least would be in the U.S. ? If not, then why has it been rejected ? Let me turn to a series of reasons that, I believe, explain our inaction south-of-the-border.

### 2.1 Politics

#### 2.1.1 The Power of the Plaintiffs' Lawyers

Due to the « checks and balances » system of state politics in the U.S., the election of a candidate from a particular party, favorable to your interests, to the top job (*i.e.*, governor) hardly suffices to ensure favorable legislative outcomes — as it may in Canadian provinces. This is because the other major political party may still control one or the other (or both) houses of the state legislature, hence controlling the committees through which legislation must pass. Moreover, sometimes a member of the governor's or dominant party will maintain control over a key legislative committee and yet have a different agenda from that of the governor or the party generally.

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15. R.H. JOOST, *op. cit.*, note 9, p. 8, section 1:2.

16. R.H. JOOST, *Automobile Insurance and No-Fault Law*, 2<sup>nd</sup> ed., Deerfield, Clark, Boardman & Callaghan, Supp. 1997, p. 29, section 1:2D.

17. R.H. JOOST, *op. cit.*, note 9, p. 6, section 1:2.

18. R.H. JOOST, *op. cit.*, note 16, p. 118, section 7:6.

19. *Id.*, p. 53.

These key committee chairs have enormous power to block legislative reform.

Given this system, in the U.S., so-called « special interests » are often able to influence the outcome of political issues of particular concern to them. One of the best ways is to have built up the support of legislators who chair or serve on committees with jurisdiction over the matters most salient to the special interest group. And one way to win *that* support is through campaign contributions. In most states in the U.S., lawyers who represent accident victims have organized themselves to take advantage of the political and campaign contributions systems, and have, as a result, obtained considerable leverage with key state legislators. In general, the plaintiffs' bar has allied itself with and funded Democrats, and like the Democratic party, the lawyers portray themselves as the defenders of ordinary people (consumers and victims). They characterize their opponents, the Republicans, as representatives of the powerful corporate interests in the society.

So, for example, when the business community seeks to limit the amount of money that accident victims can recover under tort law for pain and suffering, the Democratic legislators and the plaintiffs' lawyers form a natural alliance in opposition. The self-interest of the lawyers in this and similar settings is clear, especially because of the near universal practice in the U.S. of lawyers handling personal injury cases on a contingent percentage basis. That is, legal fees typically are approximately 1/3 of the total recovery, and so any change that reduces what victims may be awarded directly reduces the lawyers' incomes as well.

Yet sometimes the interests of consumers and victims may not coincide with those of the trial lawyers. Quebec-style auto no-fault is a good example. The Quebec plan's supporters claim that it benefits consumers enormously by providing quick and generous compensation to more victims at a lower overall cost to motorists. But since one of the main effects of implementing Quebec's comprehensive no-fault plan in the U.S. would be to reduce plaintiff personal injury lawyers' fees dramatically, it should not be surprising that these lawyers have tried to discredit its attractiveness as a consumer/victim measure.

In California, for example, comprehensive automobile no-fault plans appear to have no chance legislatively so long as Democratic friends of the trial lawyers' lobby control one of the key committees (Insurance or Judiciary) in either the state Senate or Assembly (something they have done for many years now despite the election of Republican governors). This has prompted proponents of auto no-fault to seek reform through the « initiative » process. A frequently employed mechanism in California and a few



other states, initiatives are a way that citizens may force a popular vote on matter, in effect bypassing the ordinary legislative process.

For example, in 1988, key players in the auto insurance industry sponsored Proposition 104. By this I mean that industry leaders drafted the initiative, paid people to gather the required number of voter signatures needed to get the measure put on the ballot, and then carried the lion's share of the cost of advertising and other measures carried out on its behalf<sup>20</sup>.

Proposition 104 was by no means a comprehensive auto no-fault scheme. It was, rather, a modest «modified» plan providing moderate no-fault benefits and curtailing tort law recovery for pain and suffering in less serious injury cases. This measure was badly defeated by the voters<sup>21</sup>.

In the 1990s a new effort was launched. This time a comprehensive auto no-fault plan was put on the ballot in the spring of 1996 in the form of Proposition 200. This measure would have provided victim compensation broadly comparable to what Quebec provides, and it would have eliminated nearly as much of the tort law as Quebec has eliminated. But, unlike Quebec, this proposal assumed that private insurers would continue to sell and administer the no-fault-bodily-injury insurance mandated by the plan. Proposition 200 was the brainchild of a gadfly U.S. reformer named Andrew Tobias who lives in Florida, writes national columns for prominent publications, and had been promoting versions of auto no-fault for years. The insurance industry lent some support to the effort. Tobias also obtained considerable financial backing from parts of the business community (especially high tech companies located in California's Silicon Valley) by yoking his measure politically to two other ballot initiatives that were also advertised as litigation-reducers<sup>22</sup>. Proposition 200 was also strongly rejected by the voters (65 % to 35 %)<sup>23</sup>.

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20. It is now common that ballot initiatives in California are actually promoted by well-organized interest groups rather than loose collections of grass roots voters who have arisen to support a cause—defeating the original vision behind the initiative process. So, too, it is common for sponsors to pay people to collect the signatures necessary to put initiatives on the ballot. See A. TOBIAS, «Ralph Nader is a Big Fat Idiot», *Worth* (Oct. 1996) 92, at 100.

21. Proposition 104 was defeated 74 to 26 %. See *The [San Diego] Union Tribune* (9 November 1988) A4.

22. See A. TOBIAS, *loc. cit.*, note 20, 105. Proposition 201 would have limited people's right to sue when the value of stock they bought dropped, and would have helped high tech enterprises especially. Proposition 202 was designed to reduce legal fees in cases taken on a contingent fee basis. *Id.*, at 172-173.

23. *The [San Francisco] Examiner* (27 March 1996) A6.

The plaintiffs' lawyers' lobby in California was the main source of the funds that were used to advertise against both Propositions 104 and 200<sup>24</sup>. They were also the main opponents in Hawaii where the legislature in 1995 passed a comprehensive no-fault scheme that would have expanded that state's existing, more-limited plan. But that measure was vetoed by the Democratic governor, himself a trial lawyer before entering politics<sup>25</sup>. The trial lawyers are greatly assisted in their fight against auto no-fault by having, from time to time, the support of certain important consumer groups, and, most importantly, the steadfast support of Ralph Nader.

### 2.1.2 Ralph Nader's Devotion to the Civil Justice System

Ralph Nader won his reputation in the U.S. as « Mr. Consumer » in the 1960s when he campaigned against unsafe automobiles<sup>26</sup>. At that time, General Motors helped make him especially famous by engaging in tactics against him that resulted in a lawsuit by Nader against GM for invasion of privacy in which Nader won a great deal of money and GM emerged with a very black eye<sup>27</sup>. It seems from the outside at least, that Nader's own experience in successfully using the civil justice system to combat wrongdoing by a large corporation has made him a stalwart defender of tort law and the trial lawyers' most important ally.

Whereas the trial lawyers might be dismissed as merely mouthing consumer protection arguments as cover for what is their own self-interest, this hardly applies to Nader, who has a reputation for exceptional selflessness and asceticism in his personal life. Some have tried to tar Nader by saying that his support for the trial lawyers is based upon the financial support they, in turn, supply to some of the organizations he has founded<sup>28</sup>. But I think that most close observers have rejected this claim, concluding instead that Nader truly believes in tort law — in all of its reach.

It is fairly easy to see why Nader would, for example, oppose eliminating product liability suits against major manufacturers, even if they were replaced with a generous compensation scheme: this would deprive consumers of the role that some people (including Nader) think that tort law plays

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24. *Ibid.* See also, A. TOBIAS, *loc. cit.*, note 20, 175-176.

25. See A. TOBIAS, *loc. cit.*, note 20, 174-175.

26. See, e.g., R. NADER and J.A. PAGE, « Automobile Design and the Judicial Process », (1967) 55 *Cal. L. Rev.* 645.

27. See *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765 (1970); see also, M.A. FRANKLIN and R.L. RABIN, *op. cit.*, note 5, p. 1069 (discussing *Nader v. General Motors Corp.*).

28. See P. BRIMELOW and L. SPENCER, « Ralph Nader, Inc. », *Forbes* (17 Sept. 1990) 117; A. TOBIAS, *loc. cit.*, note 20, 176.

in preventing and/or exposing corporate misconduct. And while others might believe that a better solution would be a combination of a product injury compensation fund and a scheme that rewards whistle-blowers who disclose wrong-doing by product makers<sup>29</sup>, this is an issue on which neutrals can conclude that there are reasonable arguments on both sides. Accordingly, Quebec has not broadly replaced tort law for product injuries with a compensation plan.

When it comes to routine auto injuries, however, the story is very different. Tort defendants here aren't generally corporations, but rather other drivers. It is clear that under U.S. tort law approximately half of the bodily-injury, liability-insurance premium paid for auto insurance goes for transactions costs, primarily to pay the legal fees of one side or the other<sup>30</sup>. Moreover, of the remainder that is paid out to victims, far more goes as compensation for pain and suffering or to duplicate benefits that victims already have from health insurance and other sources than is paid to compensate for true out-of-pocket economic losses<sup>31</sup>.

Still, Nader is adamantly against auto no-fault schemes of all sorts, apparently on the ground that Americans have an absolute right to access to the civil justice system that cannot be denied to them, and the belief that it is important for victims to win as much in pain and suffering as juries or settlement will provide<sup>32</sup>. Nader's opposition has made it very difficult for no-fault advocates to convince people in the U.S. that the right sort of plan could actually be a great benefit to consumers overall.

### 2.1.3 Opposition of the Insurance Industry

Although most major U.S. auto insurers have supported the so-called « modified » auto no-fault strategy, and many would support a comprehensive auto no-fault plan as well, they are, obviously, opposed to certain aspects of the Quebec solution. The insurers want to stay in the business of

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29. See generally, S.D. SUGARMAN, *Doing Away With Personal Injury Law*, Westport, Quorum Books, Greenwood Publishing, 1989.

30. M.A. FRANKLIN and R.L. RABIN, *op. cit.*, note 5, pp. 756-757 (reprinting, *Automobile Insurance... For Whose Benefit ?*, *op. cit.*, note 7, pp. 17-44) ; see also U.S. DEPARTMENT OF TRANSPORTATION, *op. cit.*, note 6, p. 43 (June 1977).

31. M.A. FRANKLIN and R.L. RABIN, *op. cit.*, note 5, pp. 756-757 (reprinting, *Automobile Insurance... For Whose Benefit ?*, *op. cit.*, note 7, pp. 17-44).

32. See, e.g., R. NADER, « The Corporate Drive to Restrict Their Victims' Rights », (1986-87) 22 *Gonz. L. Rev.* 15 ; see also, R. NADER and J.A. PAGE, « Automobile-Design Liability and Compliance with Federal Standards », (1996) 64 *Geo. Wash. L. Rev.* 415 (noting that tort law is an essential supplement to federal regulation and the proper role of auto-design product liability suits is to help reduce the number of traffic accidents and the severity of injuries).

providing coverage for bodily injury from auto accidents, and Quebec's plan gives that business to a government monopoly. Understandably, the U.S. companies would not be content merely writing the property damage coverage that private insurers are limited to providing in Quebec. Tobias' Proposition 200, on the other hand, allowed private insurers to continue to sell and administer the bodily injury coverage mandated by the plan. Hence, some insurers supported it. Yet this support was not terribly enthusiastic, in part because these companies thought that the initiative probably wouldn't pass anyway and in part because of concerns that open support by insurers would make Proposition 200 even less popular. Moreover, some insurers didn't like Proposition 200 because they oppose any scheme that will lower the amount of premiums they collect, even if the scheme is more predictable and easier for them to administer<sup>33</sup>.

In contrast to the insurers' limited support for Proposition 200, when Tobias and I earlier circulated auto no-fault proposals that would be funded primarily «at the pump» (*i.e.*, with fuel surcharges) the industry totally opposed us<sup>34</sup>. Even though we included the private insurers in our proposals as claims administrators (and even though some versions would have allowed them to continue to serve as risk spreaders), the insurers took the position that «pay at the pump» involved too much government control for their taste; it was, in effect, too much in the direction of the Quebec solution.

This stance, in a broad sense, mirrors the industry's position on workers' compensation. The insurers strongly support workers' compensation as a nearly complete substitute for tort claims against the employer (which is the rule in all of the United States), but they strongly oppose its implementation in those few states where the state government has created a single, government-run and publicly-owned insurer to handle the business. And the insurers have generally been successful in this opposition, since, in the great majority of states, either private workers' compensation insurers are the exclusive providers, or else the private firms share the market with a competitive state insurer that usually garners only a small portion of the employers as customers<sup>35</sup>.

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33. See A. TOBIAS, *loc. cit.*, note 20, 173, 175.

34. *Id.*, at 96-97.

35. In the U.S. approximately 60 % of employers obtain worker's compensation coverage through private carriers, approximately 20 % obtain coverage through state funds, and approximately 1 % of employers «self-insure» against their employees' injuries. See THE AMERICAN LAW INSTITUTE, *Reports' Study, Enterprise Responsibility for Personal Injury 121*, Vol. I, Philadelphia, American Law Institute, 1991.

In short, with the trial lawyers, Nader, and the insurance companies all against the Quebec auto no-fault solution, political realities alone may fully explain why no U.S. state has enacted a similar scheme.

## 2.2 Public Perceptions

Yet, beyond mere politics, opponents of importing the Quebec approach to the U.S. are able to trade on certain public perceptions that are noticeably different in the states as compared with Canada.

### 2.2.1 Public Distrust of Government

For one thing, in the U.S. there is a fairly strong block of voters who take a dim view of any proposal that calls for a government agency to run the scheme at issue. This does not mean that it is absolutely implausible for the Quebec arrangement to be transplanted to the U.S. After all, the California legislature recently created the California Earthquake Authority which is charged with the role of making earthquake insurance available to property owners<sup>36</sup>. But this scheme was adopted only because very few private insurers were willing to sell earthquake insurance. Additionally, because California law required those selling homeowner's insurance (*i.e.*, broad «fire and theft» insurance) to offer their clients earthquake coverage as well, this was creating a crisis in the availability of the basic homeowner's insurance. Nonetheless, a plan to replace the now functioning auto insurance market (there are literally hundreds of companies selling auto insurance in California) with a monopoly public-provider is sure to run into widespread skepticism about how efficiently, effectively, or fairly the government insurer would operate.

### 2.2.2 Public Distrust of Insurance Companies

While distrust of government may help explain why the precise Quebec solution would face a very high hurdle to its enactment in the U.S., that does not explain why a state might not embrace Quebec's treatment of tort and no-fault benefits in a way that is administered by the private insurance industry (as California's Proposition 200 envisioned). But, here too, we run into a public perception problem: the equally widespread distrust of the insurance industry.

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36. See generally, *West Cal. Ins. Code*, Section 10089.5 et seq.; D. ADAMSON and D. McNARY, «Quest for Quake Insurance Some Californians Finding Fault with State — Operated Coverage Plan», *The [Los Angeles] Daily News* (5 January 1997) B1.

California's Proposition 103, barely passed in 1988 with Nader's support in the election that saw Proposition 104's no-fault scheme go down to defeat, was promoted on the basis that the auto insurers had, in effect, conspired to gouge consumers with unreasonably high premiums and then to mistreat them when claims were filed<sup>37</sup>. Furthermore, reflecting distrust of insurers, California most particularly, but now more and more states, have allowed insurance consumers to file tort actions (entitling winners to both open ended awards for pain and suffering and largely unconstrained sums for punitive damages) when their insurers in « bad faith » resist paying claims<sup>38</sup>.

While, of course, the current auto injury compensation scheme also relies on the private insurance industry to provide the benefits, at least most victims with any sizable claim are able to enlist a lawyer to fight for them—a lawyer who can be paid a contingent fee out of the generous pain and suffering benefits the lawyer can obtain in the settlement (or trial). But comprehensive, auto no-fault is meant to be administered largely without lawyers, and there is typically no generous « cushion » in its benefit structure to pay for legal representation if that is desired. Some people in the U.S. fear this will leave claimants, especially low income claimants, at the mercy of the insurance companies.

What all this means to me is that if a comprehensive auto no-fault plan to be run by private insurers is proposed and the plan is endorsed by the insurers, it will start out facing widespread opposition from the public at large.

### **2.2.3 Public Skepticism about the Financial Benefits**

Those public misgivings might well be ameliorated if people could be convinced that motorists would save a great deal of money under a comprehensive auto no-fault scheme like Quebec's. Looking at the Quebec experience, one ought to be able to conclude that adopting a similar plan, say, in California would save motorists billions of dollars. Astoundingly, in Quebec the annual premiums motorists pay for no-fault bodily injury protection today are not substantially more than they were when the plan was enacted 20 years ago—\$142 (Canadian) for a good driver in 1998, as compared to about \$100 in 1978<sup>39</sup>. Yet in that same period the benefits paid out under the

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37. See generally, S.D. SUGARMAN, « California's Insurance Regulation Revolution: The First Two Years of Proposition », (1990) 103 *San Diego L. Rev.* 683.

38. See, e.g., R.C. HENDERSON, « The Tort of Bad Faith in First-Party Insurance Transactions After Two Decades », (1995) 37 *Ariz. L. Rev.* 1153.

39. In 1997 Quebec motorists paid \$112 (Canadian) for their bodily injury protection, paying for it in two parts, \$87 at the time of vehicle registration and \$25 at the time of driver's

plan have more than tripled, as wages and other costs have increased sharply (if nothing else because of inflation)<sup>40</sup>. Moreover, a study by the RAND Corporation's Institute for Civil Justice found that significant savings would occur were California's Proposition 200 adopted<sup>41</sup> — savings that could be translated into sharply lower auto insurance premiums. Yet it is by no means clear that the public believed this about Proposition 200.

First, and perhaps most importantly, auto no-fault in the U.S. simply does not have a reputation as a money-saver for motorists. Of course, those in-the-know realize that experience with «add-on» plans is a very poor indicator of what would happen under a Quebec-style plan. But for the U.S. public, no-fault is an idea that has been around for quite some time now and its supporters are hard put to point to places where car owners have come out way ahead. Of course, supporters could point to Quebec, but the political reality in the U.S. (alas) is that experience from other nations is typically not terribly persuasive, especially in this context when there seems to be some U.S. experience that is contrary (even if not really analogous) to Quebec's.

This perception about no-fault might be overcome if other «government» insurance programs had good track records in terms of saving money that could be pointed to by way of analogy. But here too the U.S. track record is not attractive. For example, workers' compensation insurance rates (another no-fault scheme, after all) have risen sharply over the past two decades (in terms of percent of payroll); and the U.S. scheme for providing public health insurance to the elderly (Medicare) has become dramatically more costly in the three decades since its adoption and has regularly far out-paced cost projections.

Altogether, then, it is a very difficult uphill battle to convince the U.S. public generally that a no-fault idea imported from Quebec is going to save motorists a great deal of cash — even if it will.

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license renewal. In 1998, the amount paid at the time of vehicle registration increased to \$117, returning to the 1996 level. See interview with André Viel, Chef de Service des Études et des Stratégies en Assurance Automobile, Société de l'assurance automobile du Québec, email, January 29, 1998.

40. See SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC, *Annual Report*, Quebec, S.A.A.Q., 1994. Because of inflation, the Canadian consumer price index is 275 % of what it was in 1978: interview with Daniel Gardner, Professor of Law, Université Laval, email on February 2, 1998.

41. S. CARROLL and A. ABRAHAMSE, *The Effects of a Proposed No-Fault Plan on the Costs of Auto Insurance in California*, Issue Paper, Santa Monica, RAND Institute for Civil Justice, March 1995.

## **2.3 Cultural Traditions**

Even if the public was convincingly shown that legal costs would be reduced and motorist premiums would be sharply lowered, Quebec-style auto no-fault runs counter to important U.S. cultural traditions.

### **2.3.1 Ideological Commitment to Individual Responsibility**

For one thing, there is in the U.S. strong ideological support for the notion of individual responsibility, an idea which lies behind tort law and is rejected by comprehensive no-fault. Conservatives typically embrace this value on many issues, most notably the « crime problem » — which liberals have tended to blame, at least in part, on the economy, the education system and the like. Recently, the U.S. has addressed « welfare reform » and in this round the Democrats, with President Clinton leading the way, joined with Republicans in emphasizing the personal responsibility theme. Given this bi-partisan support at least in the welfare area, there would surely be ideological disinclination to abandon it for motorists.

Of course, in practice, it is rather misleading to say that the tort system holds careless drivers personally responsible for their misconduct. If they are uninsured, they are not sued. If they are insured, then it is their insurance company that pays. Although this might be translated into higher individual premiums the next year, this is a private, not a public, penalty. Moreover, since few auto accident cases go to trial, tort law rarely serves the function of publicly denouncing the defendant's conduct as improper. Hence, it is more the symbolism of personal responsibility that people in the U.S. must be reluctant to overthrow for no-fault.

To be sure, workers' compensation is a no-fault plan that is well entrenched in the U.S., and there is no serious move to return workplace injuries to the tort system. But there the employer is formally obligated to provide benefits for injured workers, an outcome that trades on the idea that the employer has control over the workplace and so should take responsibility for what happens there. In auto no-fault, by contrast, rather than imposing strict liability on those who crash into other vehicles, drivers must look to their own insurers for coverage of accidents that occur in settings where the other car's driver could well have been at fault.

### **2.3.2 Lack of Support for Collective Responsibility**

The other side of the « personal responsibility » coin is the relative lack of ideological commitment in the U.S. to the principle of collective responsibility, at least as compared with Canada. To be sure, there are wonderful stories of people in the U.S. coming to each other's aid in times of



emergency, all sorts of disaster relief assistance is provided through government programs, and, of course, there is a strong commitment to collective responsibility for things like education. But as just noted above, there has recently been a retreat from that norm in the public benefits area, and there has never been a strong endorsement of it in the health care area, making the U.S. in this respect quite unlike most industrially-developed nations. In short, in a country where there is, in general, a rather patchy safety net, it is not surprising that no special effort has been made to assure compensation to victims of auto accidents — despite the very prominent role that they play in the universe of serious and fatal accidents<sup>42</sup>. Indeed, as noted already, to the extent that states have embraced auto no-fault at all, all but two of them have excluded from its reach those very victims most in need of a thicker safety net — that is, the most seriously injured.

## 2.4 Trade-offs

When Quebec in 1977 embraced comprehensive auto no-fault and abandoned tort law for auto accidents, some people were worse off as a result. But, on balance, the trade-offs then made seemed quite fair, at least to the Quebec government that made the decision. In the U.S., however, the trade-offs would be somewhat different and, as explained below, would generate stronger objections from the losers (or those who claim to speak on their behalf).

### 2.4.1 A More Generous Tort Law

Speaking generally, Quebec's pre-1977 tort law was less generous than U.S. tort law. Of course, each state has its own tort law, and so eliminating tort recovery as part of a comprehensive no-fault plan would mean something different from place to place. Moreover, state tort law has changed since 1977 so that as it changes the tradeoff also changes.

For example, at the time Keeton and O'Connell put forward their auto no-fault proposal in 1965, the formal law in nearly all states treated the contributory negligence of the victim as a complete bar to recovery. Although it was then widely believed that juries commonly ignored this rule, it surely played an important role in discouraging some potential claimants from filing at all and gave insurers in certain cases extremely strong bargaining positions. By now, nearly every state has adopted a comparative fault

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42. In 1996 there were 43,300 unintentional motor-vehicle deaths, out of a total of 93,400 unintentional deaths. Also, in 1996 there were 2,600,000 motor-vehicle related disabling injuries, out of a total of 20,700,000 disabling injuries. *National Safety Council Accident Facts (Injury Statistics)*, <http://www.nsc.org> (visited on March 9, 1998).

regime that, at least when the victim is less at fault than the injurer, merely reduces compensation rather than barring it completely<sup>43</sup>. Indeed, many believe that comparative negligence was enacted in many places in the 1970s, at least in part, in order to blunt the demand for no-fault.

Also in 1965 several states still had « guest statutes » on their books, which generally denied passengers recovery against negligent drivers. Now these have all but disappeared<sup>44</sup>. For these two examples, then, as compared to today there would have been many fewer « losers » back in the 1960s had comprehensive auto no-fault then been adopted and tort law for auto accidents eliminated. That is, comparatively speaking on those two dimensions, even more would have to be given up were the tort regime overthrown today instead of in the 1960s. Overall, however, that conclusion must be tempered because more recently many states have cutback the amount of damages that may be awarded in tort cases. This has had the opposite effect — reducing the amount of recovery that would be given up were comprehensive auto no-fault adopted today.

#### 2.4.2 Especially Generous Awards for Pain and Suffering

Nevertheless, what is (and was) the most important difference between U.S. tort law and Canadian tort law is the much greater generosity in the U.S. in the amount of money paid out for pain and suffering, also called « general damages. » This difference, which certainly existed in the 1960s, is probably even more pronounced today. Moreover, this is the head of damages that Nader and the trial lawyers emphasize in their fight against no-fault.

Several points bear attention here. Perhaps most interesting for the U.S. audience is the fact that Quebec's auto no-fault plan actually pays out sums for pain and suffering. In 1994, for example, about 12 % of the costs of the scheme went to fund such awards<sup>45</sup>. This is probably quite surprising to most people in the U.S. who know anything about auto no-fault, because discussions of auto no-fault in the U.S. have almost all been premised on the assumption that pain and suffering benefits will not be provided. (Of course, if only « modified » plans are being considered, then pain and suffering awards are curtailed in only the non-serious injury cases.)

In any event, the level of the awards for pain and suffering made under the Quebec plan is quite modest as compared with U.S. tort law. Although

43. V.E. SCHWARTZ, *Comparative Negligence*, 3<sup>rd</sup> ed., Indianapolis, A. Smith Co., 1994, pp. 2-4; R.H. JOOST, *op. cit.*, note 9, pp. 14-15, section 1:3.

44. R.H. JOOST, *op. cit.*, note 9, p. 16, section 1:5.

45. SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC, *op. cit.*, note 40.

the most seriously-injured claimant will be able to obtain as much as \$175,000 Canadian starting in 1999<sup>46</sup>, large amounts are rarely awarded, and in any case this is more than an order of magnitude less than what can be awarded in U.S. cases now. By contrast, in Quebec in 1977 the cutback in the amount awarded for this purpose was substantially less. So, to emphasize the point directly, some U.S. auto accident victims would receive enormously less money than they do today (even after paying their legal fees) were the Quebec scheme simply transferred to the U.S.

At least two qualifications to this point are in order, however. The first is that a state could always adopt the Quebec plan in general and yet make the pain and suffering awards substantially larger. This would, of course, make the plan substantially more expensive. But since the U.S. tort system is currently so generous in what it awards, this means that insurance rates are much higher than they would be in Quebec were Quebec to go back to its old tort law, and hence, even with a more generous no-fault benefit package, there is still considerable room for premium reduction.

Second, the problem of «uninsured» and «under-insured» motorists in the U.S. also reduces the amount that would be given up were comprehensive auto no-fault adopted. That is, while some U.S. victims win millions for pain and suffering, most victims are unable to recover anything like that amount—not because of tort law, but because of the limited ability of their victims to pay. Nationwide it is estimated that about 17 % of U.S. drivers are uninsured<sup>47</sup>, and another 50 % have liability insurance in the amount of \$50,000 (U.S.) or less<sup>48</sup>. Together these facts mean that, despite tort law's superficial generosity, most seriously-injured victims are vastly under-compensated, often recovering only a small share of their economic losses and nothing for pain and suffering<sup>49</sup>. For these victims, a Quebec-style approach would actually deliver much better benefits. Still, there is no doubt that a

46. As soon as the proposed modification to the actual s. 73 of the *Automobile Insurance Act* will be adopted : *Loi modifiant la Loi sur l'assurance automobile*, Projet de loi 429, 2<sup>e</sup> session, 35<sup>e</sup> législature (Québec), s. 21.

47. J.D. KHAZZOOM, *What We Know About Uninsured Motorists and How Well We Know What We Know*, Discussion Paper 98-09, Washington, Resources for the Future, December 1997, Table III.3.

48. See J. O'CONNELL, « No-Fault Auto Insurance : Back by Popular (Market) Demand ? », (1989) 26 *San Diego L. Rev.* 993, 1000, note 18 ; S.J. CARROLL and J.S. KAKALIK, *No-Fault Automobile Insurance : A Policy Perspective*, Santa Monica, RAND Institute for Civil Justice, R-4019/1-ICJ, 1991.

49. See S.J. CARROLL and J.S. KAKALIK, *No-Fault Approaches to Compensating Auto Accident Victims*, Santa Monica, RAND Institute for Civil Justice, RP-229, 1993, pp. 278-281 ; see also S.J. CARROLL et al., *No-Fault Approaches to Compensating People Injured in Automobile Accidents*, Santa Monica, RAND Institute for Civil Justice, R-4019-ICJ, 1991.

small minority of the gravely injured who are able to sue a defendant with very deep pockets would trade off quite a bit of money were a comprehensive no-fault scheme adopted.

Also, the modestly injured with an insured at-fault defendant to claim against would also probably be worse off (and relatively more so than in Quebec) under plausible U.S. comprehensive plans. Is this bad? Many of us believe that, in return for a good no-fault scheme, pain and suffering awards should be readily abandoned for such victims (most of whose pain and suffering is in the past before they see the money paid in compensation). Yet, the political support for these very victims appears to be precisely what has led to so many states enacting « add on » plans rather than « modified » plans.

Thus, the general point remains that, in the U.S. setting, the inevitable pain and suffering « take away » will loom as a larger trade-off than it did in Quebec. This is something which tort defenders make good rhetorical use of, especially so long as they don't have to disclose how many U.S. claimants (especially the seriously injured) fail to tap into this bonanza.

For some tort critics, the idiosyncratic pattern of recovery we observe in the U.S. — whether because of insurance availability and amount or because of inconsistent jury results or uneven lawyer bargaining ability — provides a strong argument for replacing the common law system with a reliable and routinely more uniform compensation plan. Yet, it is by no means clear that this view would be broadly embraced by the U.S. public.

That is, it sometimes seems that many people enjoy the lottery-like aspect of U.S. tort law that makes some people rich by the luck of the draw. This is perhaps consistent with the interest many people in the U.S. have in playing lotteries in general. In order to deal with this phenomenon, Tobias reported making a wickedly clever proposal to Nader as a way to try to win his support. Tobias suggested that a special lottery would be held every so often that would be open only to those who had made successful claims under the comprehensive auto no-fault plan. Tickets would simply be given out to the claimants along with their recovery under the no-fault scheme (perhaps with more tickets going to those who had been more seriously injured). The lucky winners would get lump sum prizes of various sizes. Tobias asserted that results of this lottery would not differ dramatically from how tort law in action now works, and yet this lottery would be enormously cheaper to administer and fund. We may assume that Nader was not amused.

### 2.4.3 The Uninsured Motorist Problem

As noted above, it is estimated that perhaps one in six car owners in the U.S. goes without automobile liability insurance—even though having this insurance is compulsory in more than 40 states<sup>50</sup>. In some places the uninsured rate is strikingly higher; in California, for example, nearly 30 % of motorists are thought to be uninsured<sup>51</sup>.

It is typically claimed that many of the uninsured are poor people. The picture painted by some is that the poor desperately need their old car to get to work (given the poor public transportation system throughout most of the U.S.), but would have to deprive themselves and their children of food if they bought car insurance. While this portrait is surely true of some of the uninsured, some suggest that many could afford to buy insurance and don't<sup>52</sup>. It seems that they don't buy partly because they don't expect to be in an accident at which they are at fault and don't expect to get caught without having the required insurance (since enforcement of the compulsory insurance laws has been notoriously lax in most states). But, in addition, it seems that many of the uninsured just figure that they will be essentially judgment-proof if they do happen to cause an accident, and that without insurance they just won't be sued. Surely many talk themselves into adopting this morally dubious posture because automobile insurance rates are so high in the U.S. in large part due to our Rolls Royce-like tort law.

The prevalence of uninsured motorists has been one of the strong arguments in favor of adopting a comprehensive auto no-fault scheme in the U.S. Because premiums would come down, more would buy coverage, and, more importantly, those who still failed to do so would now be depriving themselves of protection instead of their victims.

But there is another, somewhat bizarre, side of this coin. If a plan like Quebec's were adopted, not only would it be compulsory, but also we could expect that vigorous efforts would be made to enforce participation. In Quebec, for example, uninsured motorists risk having their cars impounded, among other penalties. A compulsory, well-policed no-fault scheme would help achieve the near universal coverage of accident victims that is intended by its designers. Yet, returning to the California data, this would mean an

50. See INSURANCE INFORMATION INSTITUTE, *Insurance Issues Update*, New York, Insurance Information Institute, October 1997 (noting 43 states and the District of Columbia require liability insurance); see also R.H. JOOST, *op. cit.*, note 9, p. 21, section 1:8.

51. J.D. KHAZZOOM, *op. cit.*, note 47, Table III.1.

52. T.E. TROXEL, Ph.D., Remarks at the «No-Pay-No-Play: Addressing The Uninsured Motorist Issue» Conference, San Diego, CA (15 December 1997).

extra financial burden for the 30 % of drivers who don't buy insurance now. Even if the burden were far less than what auto insurance would cost them today, it still would be an increase in the out-of-pocket costs of car ownership. Although some would welcome the ability to obtain coverage and comply with the law at a modest price, many others would prefer to continue to « go bare » (especially if the cost in the U.S. were around \$300 U.S. a year as was envisioned under Proposition 200, rather than the less than \$150 Canadian charged by the Quebec scheme)<sup>53</sup>.

As a result, I imagine that many of today's uninsured drivers would oppose an effectively-enforced, no-fault scheme. While their position is a difficult one to present in public debate, it nonetheless lurks in the background and can be acted on individually at the ballot box when initiatives are proposed (although it is probably true that the uninsured are very disproportionately non-voters). In short, the greater ease with which one can be an auto insurance scofflaw is yet another « benefit » of the existing U.S. scheme that would have to be traded away were the Quebec solution to replace it.

## **2.5 Some Policy Concerns About the Quebec Model**

My discussion so far has focused on obstacles to enactment in the U.S. of a Quebec-style auto no-fault plan on the assumption that, from a certain frame of reference, the Quebec approach is a desirable one. Now, however, I want to discuss to some concerns that may be raised about it by objective policy analysis.

### **2.5.1 Safety Fears**

Perhaps the most important worry is that comprehensive auto no-fault generates more auto accidents. Although one might even be willing to accept this outcome as part of the price for an otherwise very desirable scheme, surely this would be a strong argument against its adoption. Moreover, this is exactly the reputation that the Quebec solution has garnered among scholars south of the border. This reputation is the result of a variety of studies conducted both inside and outside Canada. The two Canadian

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53. Actually, the compulsory Quebec charge is more because one condition of car ownership in Quebec is that you carry \$50,000 in tort liability insurance for property damages (to vehicles and other property). This is privately sold and varies in cost, but \$179 (Canadian) is what a good driver in Quebec City might expect to pay annually. See interview with André Viel, Chef de Service des Études et des Stratégies en Assurance Automobile, *Société de l'assurance automobile du Québec*, email, January 29, 1998.

studies generally discussed are those of Gaudry<sup>54</sup> and Devlin<sup>55</sup>. Both found there were more auto accidents with the Quebec plan than there would have been without it. These findings are also consistent with a widely publicized study of U.S. no-fault by Landes<sup>56</sup> as well as research on no-fault in Australia<sup>57</sup>.

However, carrying out a convincing study of the impact of no-fault is extremely difficult. For one thing, since auto accident rates have been dropping generally, the researcher has to try to figure out whether the drop would have been greater had tort remained and no-fault not been adopted. Two research strategies are : 1) to explore whether the trend-line under tort law was shifted under no-fault, and 2) to compare accident rates in matched tort and no-fault jurisdictions. But, as with all research of either a time-series or cross-sectional nature, there are always extremely difficult data problems. For example, something else might have happened in the no-fault period that accounts for a trend change that should not be attributed to no-fault ; and in cross-sectional studies there is always the risk that the jurisdictions being compared are different in unmeasured ways, thereby again leading to the attribution to no-fault of accident outcomes that were actually caused by something else. To overcome these conundrums, very complicated research strategies have been employed, frequently using highly sophisticated, multiple-regression-analysis techniques that are too complex for the ordinary reader to evaluate.

At the theoretical level at least three models, containing quite different predictions about safety under the Quebec plan, could be constructed. One would rest on the idea that fears about harming one's own body, fears of getting a traffic citation or facing other criminal charges, and general moral

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54. See M. GAUDRY, «Measuring the Effects of the No-fault 1978 Quebec Automobile Insurance Act with the DRAG Model», in G. DIONNE (ed.), *Contributions to Insurance Economics*, Boston, Kluwer Academic Publisher, 1992 ; M. GAUDRY, *The Effects on Road Safety of the Compulsory Insurance, Flat Premium Rating and No-Fault Features of the 1978 Quebec Automobile Act*, Prepared for the inquiry into motor vehicle accident compensation in Ontario, 1987.

55. See R.A. DEVLIN, «Liability Versus No-Fault Automobile Insurance Regimes: an Analysis of the Experience in Quebec», in G. DIONNE (ed.), *op. cit.*, note 54 ; R.A. DEVLIN, «Some Welfare Implications of No-Fault Automobile Insurance», (1990) 10 *Int'l Rev. L. & Econ.* 193-205 ; R.A. DEVLIN, *Liability Versus No-Fault Automobile Insurance Regimes: an Analysis of Quebec's Experience*, Presented to Canadian Economic Association meeting, Windsor, Canada, 1988.

56. E.M. LANDES, «Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents», (1982) 25 *J. L. & Econ.* 49.

57. See R.I. MCEWIN, «No-Fault and Road Accidents: Some Australasian Evidence», (1989) 9 *Int'l Rev. L. & Econ.* 13-24.

feelings about not risking harm to others provide all the deterrence that can be achieved. Under this model, tort law has no additional impact on making people drive more safely. Therefore, eliminating tort law would not lead to a deterioration in driving conduct.

The second model predicts that, notwithstanding those other pressures to drive safely, tort law does promote better driving, perhaps due to fears, even exaggerated fears, of incurring higher auto insurance premiums. Hence this second model would predict worse driving under no-fault.

Moreover, two other features of the Quebec approach that might yield more accidents could be incorporated into this model. For one thing, lowered insurance costs make driving more affordable, thereby permitting more people to become motorists. That, in turn, would be expected to yield more accidents, and especially so if the new drivers are disproportionately young people who had been most effectively priced off the highway by a tort liability regime that charged them (particularly young men) well more than average (assuming, as in Quebec for many years, the state-run, no-fault plan charged all drivers the same premium)<sup>58</sup>.

Yet, in other areas of life, we don't normally consider the lowered costs of a product or service to be undesirable, even if it causes more people to use it, thereby bringing about more accidents. For example, if someone invents a new type of ski equipment that is no more dangerous than existing equipment, but is so much cheaper as to make skiing much more affordable, the number of skiers lured onto the slopes would probably increase. Yet, we would not object to the introduction of this equipment even if it also meant more ski accidents due to the increased number of skiers.

The second factor is that by providing comprehensive compensation to victims, Quebec's plan could have the effect of causing people either to be less cautious about injury to themselves or less quick to recover once injured. This is often termed the «moral hazard» problem. While «moral hazard» could potentially lead to undesirable results, many would be reluctant to forego the Quebec approach on this ground alone. After all, that analysis would equally apply to workers' compensation plans, health insurance schemes, private disability schemes and the like. But surely most will conclude that the benefit of providing people needed insurance well outweighs the moral hazard risk. Further, the risk is typically dealt with by providing victims less than full compensation through the plan<sup>59</sup>.

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58. This was the initial Quebec solution.

59. Moreover, there is skepticism about whether people really do take increased risks to their lives when insurance is available. But it seems that, in the right setting, some do so. Of course, if one were to incorporate this moral hazard idea into a model of how a



In contrast to this second model that predicts higher accident rates associated with the Quebec no-fault plan, a third model predicts lower accident rates. The theory here is that when a government agency is charged with responsibility for running the scheme that has to charge premiums to the public, it will be under great political and public pressure to keep those premiums low. As a result, it will also be under pressure to find ways to lower accident rates so as to reduce claims on the scheme, through public education and specific safety-promotion measures.

Interestingly enough, despite the early negative empirical findings about the Quebec plan on safety grounds, there is now reason to reject those results. For one thing, officials running the Quebec plan claim they have been highly effective in reducing accident rates and can point to specific safety-promoting measures they have generated<sup>60</sup>. To be sure, without the application of sophisticated research methodologies, one should not rely too heavily on these officials' claims. Yet Gaudry himself has released a much more recent study that comes to the opposite conclusion from his earlier work—suggesting now that the Quebec plan lowered the accident rate more than would have occurred without it<sup>61</sup>. Furthermore, recent critiques have cast doubt on the persuasiveness of Devlin's work<sup>62</sup>. Finally, there are U.S. studies contradicting Landes's<sup>63</sup>.

For me, the bottom line is that we should not fear that importing the Quebec regime to the U.S. would yield an undesirable increase in auto

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no-fault plan might work, then one would also address the moral hazard aspects of tort law.

60. See SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC, *op. cit.*, note 40.

61. See M. GAUDRY *et al.*, *DRAG-2, un modèle économétrique appliqué au kilométrage, aux accidents et à leur gravité au Québec—Partie 4—Application du modèle aux accidents, à leur gravité et aux victimes de la route*, Direction des études et des analyses, Société de l'assurance automobile du Québec, May 1995; M. GAUDRY *et al.*, *DRAG-2, un modèle économétrique appliqué au kilométrage, aux accidents et à leur gravité au Québec—Partie 1—Estimation et analyse du kilométrage et des victimes d'accidents de la route au Québec entre 1957 et 1989*, Direction des études et des analyses, Société de l'assurance automobile du Québec, October 1993; M. GAUDRY *et al.*, *Application of econometric model DRAG-2 to the frequency of accidents in Quebec according to different levels of severity*, Proceedings of the 8<sup>th</sup> Canadian Multidisciplinary Road Safety Conference, Saskatoon, Saskatchewan, June 1993.

62. See, e.g., N. GLICK and J. BERKOWITZ, *Statistical Evidence of fatality increases in response to «no-fault» insurance?*, Paper prepared for the Insurance Corporation of British Columbia (unpublished).

63. See P. EXETER and A. LUND, «Re-analysis of the effects of no-fault auto insurance on fatal crashes», (1986) 53 *J. Risk & Ins.* 226-241 (critiquing Landes statistical regressions and conclusions); see also P.S. KOCHANOWSKI and M.V. YOUNG, «Deterrent Aspects of No-Fault Automobile Insurance: Some Empirical Findings», (1985) 52 *J. Risk & Ins.* 269-288.

accidents. Moreover, it is not necessary to embrace the flat fee rules that prevailed in the early years in Quebec. Motorists with bad driving records could easily be charged more; indeed, since 1992 Quebec has done exactly that by making bad drivers pay extra to renew their driving licenses<sup>64</sup>. Furthermore, unlike Quebec, young drivers, or novice drivers generally, might be charged an additional surcharge for their first three years on the road (with a refund of some or all of that surcharge if they were accident-free for those three years)<sup>65</sup>.

### 2.5.2 Cost Fears

The Quebec experience ought to allay cost fears. Although overall program costs certainly have increased, for example from just under \$500 million Canadian in 1990 to over \$700 million Canadian in 1994, nevertheless, as noted earlier, the insurance cost to motorists—if adjusted for inflation—is decidedly less than what it was 20 years ago. It is important to appreciate, however, a major contributor to today's low cost is that the government agency in charge wound up in the early years with far more premium income than was necessary to pay claims and wisely invested this surplus. As a result, about 40 percent of the cost of the system is now paid for by investment income<sup>66</sup>. U.S. insurers, of course, also enjoy investment income on premiums (since they collect in advance) which in turn holds premiums down somewhat. But the relative amount of investment income available to the Quebec authorities is larger than would typically occur in a competitive market. Hence, if Quebec's system today enjoyed only the average amount of investment income obtained by a U.S. insurer of comparable size, the Quebec premiums would have to increase (although they would have been still lower in the earlier years). Nevertheless, it seems reasonably clear that even if Quebec had to pay for the full cost of its plan out of current premiums (and earnings on those premiums), although the rates would go up, they still would be less in 1998 than they were in 1978 in real terms—that is, if discounted for inflation.

However, as previously pointed out, the U.S. experience with workers' compensation has been far worse. Because of that experience, some people in the U.S. will want to hold down the cost of a comprehensive auto no-fault plan by making its benefits secondary to payments by health insurance

64. See SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC, *op. cit.*, note 40; R.H. JOOST, *op. cit.*, note 9, p. 21, section 7:5.

65. See, e.g., S.D. SUGARMAN, « Pay at the Pump » *Auto Insurance: The California Vehicle Injury Plan (VIP) for Better Compensation, Fairer Funding, and Greater Safety*, Berkeley, Institute of Governmental Studies Press, 1993, p. 18.

66. SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC, *op. cit.*, note 40.

plans and other sources like Social Security. Moreover, this approach has certain administrative attractions — most importantly avoiding the transactions costs of one insurer recouping from another. Nevertheless, hypersensitivity to health care costs in the U.S. today may make this a particularly bad time for that sort of cost-shifting. The upshot is that a state importing the Quebec scheme to the U.S. might simply have to take it on faith that it could approximate Quebec's ability to control costs as compared with U.S. experience in workers' compensation.

A quite different cost concern arises from the size of the benefit package under the no-fault plan as compared with the typical liability insurance benefit package. Today, as noted already, most U.S. motorists carry either the minimum allowable auto insurance (often only \$10,000-25,000 U.S. per person injured) or else modest amounts above the minimum (\$50,000 U.S. or less). If the auto no-fault plan is to be truly comprehensive it will have to provide a far higher dollar level of coverage than \$50,000 U.S. This, of course, will make the program commensurately more expensive.

Proposition 200 in California sought to deal with this issue by making the default insurance policy have a benefit maximum of \$1 million (with certain internal limits, for example, on wage replacement), while at the same time permitting buyers to opt, if they wish, for a cheaper plan with only \$50,000 of coverage. This has the advantage of allowing the plan's promoters to emphasize how little one would pay for a \$50,000 policy. Yet if most people were actually to buy that coverage, this would leave many seriously injured victims substantially under-compensated. Of course, as noted, \$50,000 is all that many seriously injured victims now obtain, and here it would be a matter of consumer choice. Still, there is some reason to fear that too many people would buy less coverage now and later be very regretful. On the other hand, again, forcing everyone to buy the \$1 million coverage makes the plan relatively less attractive as a money-saving proposal compared with the current regime, and understandably makes the initiative more difficult to sell to the voters in 30 or 60 second sound bites that dominate most election campaigns. After all, these reforms come at a time when motorists are far more likely to respond favorably to insurance premium reductions than to distant promises of better benefits in case they are badly injured. Still, although I recognize the difficulty of the judgment that was involved, I am not convinced that the promoters of Proposition 200 dealt with these competing considerations in the wisest manner.

I do agree that the cost problem is most importantly confronted in the details of the program's design. That is, the real cost and cost escalation worries, I believe, depend upon the precise nature of the benefits provided. But before tolerating a ceiling of \$50,000 for those with no other sources of

compensation, other avenues should be pursued. For example, one would want the medical benefits to be offered in ways that take advantage of the sorts of sensible and fair cost containment strategies now beginning to be used in the U.S. in workers' compensation and health insurance plans ; one would want to be careful that rehabilitation benefits are provided in reasonably proper amounts where they can be effective and not lavishly wasted ; and one would want to avoid over-generosity in the level of replacement services benefits provided. Indeed, the drafters of Proposition 200 were very mindful of at least some of these very points. Nonetheless, I believe that with these sorts of internal controls and limits in place, sufficient financial savings could be promised to today's drivers even in a plan with \$1 million benefit maximum.

I have not yet mentioned legitimate concerns about fraudulent claims. Workers' compensation and health care schemes in the U.S. face this problem, and surely a comprehensive auto no-fault plan would as well. Indeed, fraud in the non-fault aspects of auto and homeowners' insurance is an ongoing problem. But the concern here ought to be a comparative one, since, alas, the automobile liability system in the U.S. is allegedly rife with fraud. There are ongoing reports of staged accidents, deliberate accidents, deliberate malingering after accidents, claims to reimburse the cost of medical services that were never rendered, and the like. Some argue that U.S. auto liability insurance premiums are 10-20 % higher than they would be without this sort of fraud<sup>67</sup>

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67. The Coalition Against Insurance Fraud estimates that there was \$13.4 billion in automobile insurance claims fraud in 1994 based upon the National Insurance Crime Bureau estimate of a 16.44 % fraud rate. [Http://www.InsuranceFraud.org/press](http://www.InsuranceFraud.org/press) (visited on March 9, 1998).

No doubt, the present system especially encourages fraud because of the availability of open-ended pain and suffering damages. This is the grease that draws together, for example, the crooked lawyer and doctor with the willingly fraudulent claimant. By pretending to have medical needs, the economic losses claimed are increased, thereby also increasing the amount of pain and suffering obtainable in settlement, and generating extra funds for the lawyer and for the cheating patient.

I am convinced that this sort of fraud would be less popular in a plan that didn't pay pain and suffering benefits, or at least didn't pay the amounts now paid in the U.S. Yet, on the other hand, since fault would no longer be an issue, other types of smaller-scale fraud would be encouraged. Still, on balance, especially since fraud does not seem to be a matter of serious concern in Quebec, there is reason to hope that the fraud problem would become smaller were Quebec's auto no-fault plan adopted in the states.

### 2.5.3 Slippery-Slope Fears

Some no-fault critics, probably Nader, worry that comprehensive auto no-fault would be just a foot in the door to the adoption of other no-fault arrangements, arrangements they far more strongly oppose. Others hope for exactly that — auto no-fault leading to, for example, no-fault coverage of medical accidents, pharmaceutical drug injuries, recreational injuries, and the like<sup>68</sup>. If the Quebec experience is to be any guide, auto no-fault might at first be seen as a step in the direction of other no-fault plans. That is, Quebec's auto no-fault plan was followed by a liberalizing reform of the province's workers' compensation scheme, a similar revision of the scheme to compensate victims of violent crime (now not in force), and the adoption of a scheme to compensate those who suffer side-effects from vaccinations against disease<sup>69</sup>. Moreover, there is now some discussion in Quebec about

68. See, e.g., P.C. WEILER, *Medical Malpractice on Trial*, Cambridge, Harvard University Press, 1991 (advocating for no-fault for medical accidents); R. MERRILL, « Compensation for Prescription Drug Injuries », (1973) 59 *Va. L. Rev.* 1 (advocating no-fault for prescription drug injuries); J. O'CONNELL, « No Fault Liability by Contract for Doctors, Manufacturers, Retailers, and Others », (1975) *Ins. L. J.* 531 (advocating no-fault regimes for a variety of injuries).

69. *Act Respecting Industrial Accidents and Occupational Diseases*, L.Q. 1985, c. 6 (French version at L.R.Q., c. A-3.001); *Act Respecting Assistance and Compensation for Victims of Crime*, L.Q. 1993, c. 54 (not yet in force; will replace the 1971 *Act Respecting Compensation for Victims of Crime* and copy the automobile scheme in respect of compensation levels); *Act to Amend Various Legislation Respecting Social Affairs*, L.Q. 1985, c. 23, s. 18, adding ss. 16.1 to 16.11 to the *Public Health Protection Act*, L.R.Q.,

how accidental victims of medical treatment might be covered on a no-fault basis.

On the other hand, in the years since Keeton and O'Connell proposed auto no-fault in the U.S., we too have witnessed a substantial liberalization of workers' compensation, the widespread adoption of (fairly ineffective) programs for compensating victims of violent crime, and the enactment of a national childhood vaccine injury scheme. In addition, there has been much talk in the U.S., although not any action yet, about handling the medical injury problem on a no-fault basis. Put differently, to the extent that Quebec has slid down the « slippery slope, » so has the U.S. — but without a Quebec-style auto no-fault plan to lead the way.

This suggests to me that « slippery slope »-fearing opponents of comprehensive auto no-fault should not be so fearful, and « foot-in-the-door » proponents should not feel so hopeful.

### 3. Creeping Toward the Quebec Solution ?

Although no U.S. state has yet followed the Quebec auto insurance precedent, perhaps in future years that will occur, or at least we will see moves in that direction. Just because California's Proposition 200 was defeated and Hawaii's comprehensive no-fault plan was vetoed does not mean that those ideas are dead, especially as other changes are afoot that could facilitate their rejuvenation.

#### 3.1 Auto No-fault « Choice » Plans

Realizing that « add-on » plans were probably making things worse, and that trial lawyer political power continues to block state legislative enactment of comprehensive no-fault, O'Connell and others have proposed a « choice » scheme under which individual motorists can elect to be in either the fault system or the no-fault system. O'Connell's argument is that it should be harder for the lawyers to defeat something that is a matter of consumer choice — as compared with conventional no-fault which is forced on everyone. His assumption, however, is that once given the choice, the vast majority of motorists would elect no-fault because of its lower cost and in some circumstances far better benefits.

But so far the trial lawyers, who can read the tea leaves too, have been able to block choice plans. And at least one time it was put to the voters of a state (in Arizona) advocates found they were outmatched by the lawyers'

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c. P-38, expressly referring to the *Automobile Insurance Act* in respect of compensation levels (s. 16.3).

campaign and the proposal was badly defeated<sup>70</sup>. Hence, O'Connell and others have now taken their campaign to Congress where, at least for the moment, Republicans, who aren't so beholden to the plaintiffs' bar, wield considerable political power. Yet, it is by no means clear that this approach is going to get anywhere any time soon.

### 3.2 Pay at the Pump

While this is not the place to discuss pay at the pump schemes in detail, suffice it to say that policy analysts have proposed several auto compensation plans that would be funded primarily with surcharges on the purchase of gasoline (or other vehicle fuels). These proposals are usually tied to no-fault benefit schemes although that does not necessarily follow. They have certain politically desirable attributes. First, they would largely eliminate the uninsured motorist problem in the sense that all drivers would have to pay into the plan since everyone would have to buy gasoline and relatively little fraud is likely. Second, pay at the pump is attractive to environmental groups, public transportation advocates, and those concerned about energy-efficiency because they appear to promise a combination of less driving and the purchase of more fuel-efficient vehicles.

To be sure, pay at the pump plans currently seem politically remote, if nothing else because they bring out the opposition of the «highway lobby» that a) favors more driving rather than less (*e.g.*, motel owners, fast food restaurateurs, freeway builders, the oil companies, etc.) and b) jealously guards the principle that «gas taxes» should be used only for the building and maintenance of roads.

Nevertheless, pay at the pump could possibly become the stalking horse for a Quebec-style plan—a lesser of evils that insurers and others could get behind to forestall pay at the pump.

### 3.3 Crackdowns on the Uninsured Motorist

Throughout the U.S., the public seems up in arms about the uninsured motorist problem. This has prompted the adoption of increasingly tougher sanctions against the uninsured including high fines, driving license suspension, vehicle confiscation and so on. Many thoughtful observers find these growing penalties draconian, especially when levied against poor people with few options.

Most recently, an approach called «no pay, no play» has been promoted<sup>71</sup> and has so far been adopted in a few states, including California. It

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70. See R.H. Joost, *op. cit.*, note 16, p. 26, section 1:2C.

comes in two versions. In both, anyone who is uninsured and hurt in an auto accident has his right to recover in tort limited. The idea is that since he belongs to a class of drivers who aren't paying their fair share of money into the plan, then members of that class should be restricted in what they draw from the plan when they sue. In California such motorists are denied pain and suffering damages; in Louisiana they are forced to bear some of their own out of pocket losses<sup>72</sup>. One version of «no pay, no play» limits tort recovery *in addition* to any other penalties already imposed on uninsured motorists; in the second version, tort limits are imposed *instead of* other penalties—in effect, one is permitted to go without liability insurance so long as he agrees that he won't recover fully in tort if he is injured.

My goal here is not to discuss the merits of the various approaches to the uninsured motorist problem. I want only to emphasize what was noted earlier. Under comprehensive no-fault, the uninsured motorist problem has an entirely different meaning. Instead of cheating someone you negligently injure out of recovery, your failure to insure only hurts you (and perhaps your own family). Hence, if these escalated attacks on the uninsured motorist do not achieve satisfactory results, this might be another pressure for moving to Quebec-style no-fault as a different way to combat the uninsured.

## Conclusion

I believe that adoption in California of a Quebec-style comprehensive automobile no-fault plan (perhaps administered by the private sector), would be a great benefit to most consumers and to most victims (especially those who are most seriously injured). Possibly, a few years of good experience with the Quebec model in Manitoba and Saskatchewan will demonstrate its export potential. Or, perhaps we just need to get Nader to spend a lot of time in Quebec.

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71. See, e.g., J. O'CONNELL, «Allowing Motorists a Choice to Be Legally Uninsured by Surrendering Tort Claims for Noneconomic Loss (With Some Further Thoughts on Choices Between PIP and Tort Coverage)», (1995) 1 *Conn. Ins. L. J.* 33.

72. In California, the «no pay, no play» law was passed by, as Proposition 213, by 76 percent of Californian voters in November 1996. The constitutionality of Prop 213 is currently on appeal to the California Supreme Court; however, two lower courts of appeal have sustained Prop 213's constitutionality. In Louisiana, the no pay, no play law—formally called the *Omnibus Premium Reduction Act of 1997*, or *Act 1476*—is also under constitutional attack. The law is currently on appeal to the Supreme Court of Louisiana. See also, INSURANCE INFORMATION INSTITUTE, *Insurance Issues Update*, R. GASTEL (ed.), New York, Insurance Information Institute, October 1997.